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California Supreme Court Rules That Agencies—Not Courts—Determine Whether Modified Projects Are Subject to CEQA's Subsequent Review Provisions

On September 19, the California Supreme Court held unanimously in *Friends of the College of San Mateo Gardens v. San Mateo County Community College*, that agencies—and not courts—must decide whether the "subsequent review" provisions of the California Environmental Quality Act (CEQA) must be applied for projects modified after the approval of an initial Environmental Impact Report (EIR) or Mitigated Negative Declaration (MND). Under CEQA's subsequent review provisions, when changes are proposed to a project for which an EIR or MND already has been approved, the agency must prepare a subsequent or supplemental environmental document only if the changes are "[s]ubstantial" and require "major revisions" of the previous EIR. *Friends of the College* resolved the question of who, in the first instance, decides whether the subsequent review provisions apply. The Court overruled prior case law in California that held that it is the courts that determine, in the first instance and as a matter of law, whether a project modification constitutes a "new project altogether" requiring recommencement of the CEQA process.

Background

In 2006, the San Mateo Community College District ("District") proposed a district-wide facilities master plan ("Plan") that called for demolishing certain buildings and renovating others. One of the buildings slated for renovation was the College's "Building 20 complex," which included a greenhouse, surrounding garden space, an interior courtyard and other features and amenities. The District approved the Plan in 2007 with a MND after concluding that the project would have no potentially significant, unmitigated impacts on the environment. After the District failed to obtain funding for the Building 20 complex renovation, it amended the Plan so that Building 20 would be demolished and two other buildings that had originally been slated for demolition would now be renovated. The District determined under CEQA's subsequent review provisions (Public Resources Code § 21166 and CEQA Guidelines § 15162) that a subsequent or supplemental EIR was not required and instead addressed the change through an addendum to its 2006 initial study and MND. Specifically, the District concluded that "the project changes would not result in a new or substantially more severe impact than disclosed in the 2006 [initial study and mitigated negative declaration]. Therefore, an addendum . . . is the appropriate CEQA documentation."

Plaintiff Friends of the College of San Mateo Gardens filed suit challenging the District's approval, claiming that the changes required the preparation of an EIR and adopting feasible alternatives and mitigation measures. The trial court found that the demolition project was inconsistent with the previously approved Plan and that its impacts were not

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addressed in the 2006 MND. The Court of Appeal affirmed, invalidating the District's decision, finding it "clear" as a matter of law that the District's proposed demolition of the Building 20 complex was not merely a change to its previously approved project, but a "new project altogether." The court ruled that the district's proposal was therefore subject to the initial environmental review standards of Public Resources Code § 21151.

California Supreme Court Holdings

The California Supreme Court reversed, concluding the Court of Appeal erred in applying this "new project" test. According to the Court:

> "When an agency proposes changes to a previously approved project, CEQA does not authorize courts to invalidate the agency's action based solely on their own abstract evaluation of whether the agency's proposal is a new project, rather than a modified version of an old one. Under the statutory scheme, the agency's environmental review obligations depend on the effect of the proposed changes on the decision making process, rather than on any abstract characterization of the project as 'new' or 'old.' An agency that proposes project changes thus must determine whether the previous environmental document retains any relevance in light of the proposed changes and, if so, whether major revisions to the previous environmental document are nevertheless required due to the involvement of new, previously unstudied significant environmental impacts. These are determinations for the agency to make in the first instance, subject to judicial review for substantial evidence."

Thus, when there is a modification to an approved project, an agency must make a determination under Public Resources Code § 21166, which provides that "no subsequent or supplemental environmental impact report shall be required" unless at least one or more of the following occurs: (1) "[s]ubstantial changes are proposed in the project which will require major revisions of the environmental impact report," (2) there are "[s]ubstantial changes" to the project's circumstances that will require major revisions to the EIR, or (3) new information becomes available. CEQA Guidelines § 15162 apply these principles to MNDs.

In holding that the agency must evaluate the modified project under the subsequent review provisions in the first instance, the Supreme Court stated that the plaintiff's "new project" approach would improperly "assign to courts the authority—indeed, the obligation—to determine whether an agency's proposal qualifies as a new project, in the absence of any standards to govern the inquiry." Further, in the absence of "any benchmark for measuring the newness of a given project, the new project test plaintiff urges would inevitably invite arbitrary results." The Court also noted that the subsequent review provisions under CEQA are designed to ensure that an agency that proposes changes to a previously approved project "explore[s] environmental impacts not considered in the original environmental document." According to the Court:

> "This assumes that at least *some* of the environmental impacts of the modified project were considered in the original environmental document, such that the original document retains some relevance to the ongoing decision making process (emphasis added). A decision to proceed under CEQA's subsequent review provisions must thus necessarily rest on a determination—whether implicit or explicit—that the original environmental document retains some informational value. If the proposed changes render the previous environmental document wholly irrelevant to the decision making process, then it is only logical that the agency start from the beginning under section 21151 [of the Public Resources Code] by conducting an initial study to determine whether the project may have substantial effects on the environment."

The question of whether the agency should proceed under the subsequent review provisions, according to the Court, is a factual question for the agency, and must be supported by substantial evidence. Furthermore, an agency must apply a more "exacting standard" when, as in *Friends of the College*, changes are made to a project that has been approved via a MND. In such circumstances, a "major revision" to the initial MND "will necessarily be required if the proposed modification *may* produce a significant environmental effect that had not previously been studied." Moreover, if the project modification introduces previously unstudied and potentially unmitigated significant environmental effects, "then the appropriate environmental document would no longer be a negative declaration at all, but an EIR." Thus, the substantial evidence standard in these circumstances "requires an agency to prepare an EIR whenever there is substantial evidence that the changes to a project for which a negative declaration was previously approved might have a significant environmental impact not previously considered in connection with the project as originally approved."

Save Our Neighborhood

The decision in *Friends of the College* resolved a disagreement in the lower courts. The Court of Appeal in *Friends of the College* relied primarily on *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288. There, the court invalidated an agency's approval of a proposed modification to a project that had previously been approved via MND. Although the original project and the proposed modification involved "the same land and . . . similar mixes of uses," there were a number of differences. The court held that the agency had erroneously relied on CEQA's subsequent review provisions because the proposal was not, as a matter of law, a modification but rather a "new project altogether." The court accordingly concluded that the agency is required to restart the CEQA process and to engage in an initial study of the project to determine whether an EIR is required under section 21151 of the Public Resources Code.

Save Our Neighborhood was criticized in *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385. In *Mani Brothers*, the agency certified an EIR for an original project consisting of five buildings of offices, a hotel and retail facilities. Fifteen years later, the developer proposed to revise the project by, among other things, reducing the amount of the office and retail space and adding a residential component. Overall, the project was increased from approximately 2.7 million square feet to approximately 3.2 million square feet. The *Mani Brothers* court affirmed the agency's determination that the proposal was a modification of an existing project and found the agency's conclusion that no supplemental EIR was required to be supported by substantial evidence. The court distinguished *Save Our Neighborhood* on the ground that the prior case involved an addendum to a MND and not to an EIR." However, the *Mani Brothers* court also criticized *Save Our Neighborhood*'s analysis, explaining that the "'new project' test . . . inappropriately bypassed otherwise applicable statutory and regulatory provisions," and "undermine[d] the deference due the agency." The Court of Appeal in *Friends of the College* acknowledged this disagreement, but stated that "in the narrow circumstances of the present case, where it is clear from the record that the nature of the project has fundamentally and qualitatively changed to the point where the new proposal is actually a new project altogether . . . is both workable and sound."

The Supreme Court in *Friends of the College* remanded the lawsuit involving the District's Plan for consideration of issues not raised before the Court, including whether the District abused its discretion in approving the Building 20 complex demolition based on the 2006 MND and an addendum to its Plan.